

ORIGINAL

FEDERAL MARITIME COMMISSION

INLET FISH PRODUCERS, INC.

Complainant,

v.

SEA-LAND SERVICE, INC.

Respondent.

Docket No. 00-03

Served: September 19, 2001

Report and Order denying Respondent's appeal. Remanded to the Administrative Law Judge for further proceedings.

BY THE COMMISSION: Harold J. CREEL, Jr., *Chairman*; Joseph BRENNAN, Antony M. MERCK, John A. MORAN, and Delmond J.H. WON, *Commissioners*.

COUNSEL: Steven *W. Block*, BETTS, PATTERSON & MINES, for Complainant Inlet Fish Producers, Inc. Harold *Mesirov*, Eric *S. Jackson*, and G. Brent *Connor*, ROBINS, KAPLAN, MILLER & CIRESI L.L.P., for Respondent Sea-Land Service, Inc.

REPORT AND ORDER

This proceeding was initiated by a complaint filed by Inlet Fish Producers, Inc. ("Inlet Fish") against Sea-Land Service, Inc. (now known as Maersk Sealand ("MSL")). In its complaint, Inlet Fish alleged that MSL had transported Inlet Fish's seafood products from Alaska to foreign destinations from June 1996 to August 1996, and that at some point in time, MSL moved identical or similar products for similarly situated shippers, Inlet Fish's competitors, from the same or similar points to the same or similar points. Inlet Fish further contended that MSL had permitted the similarly situated shippers to subtract the weight of packaging and wrapping (the "tare weight") from the weight of their cargo for the purpose of determining freight rates, but that Inlet Fish was not permitted to subtract the tare weight from its cargo weight when its rates were calculated. Inlet Fish averred that this resulted in it paying higher freight charges than its competitors, and constituted various violations of the Shipping Act of 1984, 46 U.S.C. app. § 1701 et seq.

Inlet Fish filed its complaint on January 21, 2000, addressing shipments with MSL that had occurred from June to August, 1996. MSL filed a motion to dismiss the complaint for lack of jurisdiction, arguing that Inlet Fish had filed its complaint more than three years after the cause of action accrued, and that the complaint was therefore time-barred under section 11(g) of the Shipping Act, 46 U.S.C. app. § 1710(g).

Presiding Administrative Law Judge Frederick M. Dolan, Jr. ("ALJ") denied MSL's motion to dismiss, ruling that the cause of action had accrued not when Inlet Fish's cargo was shipped, but rather when Inlet Fish learned that it had a possible claim against MSL. In so ruling, the ALJ found in favor of Inlet Fish's factual contention that it had not learned of the possible cause of action until 1998, and ruled against MSL's argument that Inlet Fish knew or should have known that it had a cause of action as early as the Fall of 1996.

MSL filed a request for immediate interlocutory appeal of the ALJ's order to the Commission under Rule 153 of the Commission's

Rules of Practice and Procedure, 46 C.F.R. § 502.153, which the ALJ granted. The proceeding is therefore before the Commission on an interlocutory appeal for the purpose of determining whether the ALJ was correct in denying MSL's motion to dismiss. For the reasons set forth below, we have determined to uphold the ALJ's denial of MSL's motion to dismiss.

BACKGROUND

In its complaint, Inlet Fish averred that MSL's alleged practice of permitting similarly situated shippers, but not Inlet Fish, to subtract the tare weight from the cargo when calculating freight rates constituted violations of several sections of the Shipping Act:

Section 10(b)(2), which provided that no common carrier may "rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs or service contracts;"

Section 10(b)(4), which provided that no common carrier may "allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;"

Section 10(b)(6), which provided that no common carrier may "except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of (A) rates; (B) cargo classifications;" and

Section 10(b)(12), which provided that no common carrier may "subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable

prejudice or disadvantage in any respect whatsoever.”

Inlet Fish sought \$35,091.25 in reparations plus interest, costs, attorneys' fees, and an order commanding MSL to establish and enforce lawful and reasonable practices.

A. Motion to Dismiss. and Replies

1. Motion to Dismiss

In its motion to dismiss, MSL argued that the Shipping Act's statute of limitations, at section 11 (g), provides that complaints must be filed “within 3 years after the cause of action accrued.” Noting that Inlet Fish's complaint was filed 3 1/2 years after the June - August time period when the shipments in question occurred, MSL contended that the statute of limitations is jurisdictional and cannot be waived. MSL averred that the Commission's general rule is that the statute of limitations begins to run upon the occurrence of an act that causes injury. MSL argued that Inlet Fish's cause of action accrued in June, 1996, and that the complaint is therefore time-barred and should be dismissed with prejudice.

2. Inlet Fish's Reply to the Motion to Dismiss, and
Cross-motion for Discovery

Inlet Fish filed a reply in which it argued that the cause of action accrued not when MSL charged Inlet Fish for the June - August shipments, but rather when MSL charged the similarly situated shippers the allegedly preferential rates. Inlet Fish included in its reply a cross-motion for additional discovery to determine when MSL charged the allegedly preferential rates. Inlet Fish did not specify whether all the violations of the Shipping Act listed in its complaint, or only particular

¹ Inlet Fish's complaint relates to matters occurring before May 1, 1999, the effective date of the Ocean Shipping Reform Act of 1998 (“OSRA”), 112 Stat. 1902. The sections of the Shipping Act invoked in the complaint were amended by OSRA.

sections of the Act, i.e., those involving allegedly discriminatory conduct, are implicated by the argument that the cause of action accrued when the preferential rates were charged.

Inlet Fish further argued that it did not and could not have learned of MSL's alleged violations of the Shipping Act until May, 1998. Inlet Fish argued that the proper standard for determining when a cause of action accrues is whether the complainant has discovered, or reasonably should have discovered, the actions giving rise to the complaint. Relying on Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C. Cir. 1991), Inlet Fish averred that a cause of action accrues when a complainant discovers that he was injured.

Finally, Inlet Fish averred that it tolled the statute of limitations by filing a counterclaim in the U.S. District Court for the District of Alaska on July 9, 1999, seeking the same relief it now seeks before the Commission. The district court proceeding in Alaska arose from an action by MSL to recover unpaid freight charges from Inlet Fish. Inlet Fish's counterclaim was dismissed by the court for lack of jurisdiction.

Inlet Fish filed with its reply a copy of the Alaska district court counterclaim, as well as a declaration of Vincent Goddard, dated March 6, 2000. Goddard is the principal and sole shareholder of Inlet Fish. He stated that in May, 1998, a former MSL employee advised him that MSL had permitted Inlet Fish's competitors, the similarly situated shippers, to subtract the tare weight from the cargo weight in calculating freight rates. Goddard also asserted that prior to this time, no one had ever informed him of MSL's alleged practices with respect to the subtraction of tare weight.

3. MSL's Opposition to Cross-motion for Discovery

MSL opposed Inlet Fish's cross-motion for discovery. MSL argued that Inlet Fish had possessed information forming the basis of its complaint since the Fall of 1996, and that this is apparent from court pleadings in the district court case and a bankruptcy case. MSL also averred that Goddard had asserted at a meeting on January 9, 1997, that MSL had permitted Inlet Fish's competitors to subtract the tare weight

in calculating rates. To bolster this contention, MSL provided affidavits from Timothy McKeever and William D. De Voe, lawyers for MSL. MSL averred that additional discovery would serve no purpose in this case.

4. Inlet Fish's Supplemental Memorandum

On May 25, 2000, the ALJ issued an order directing the parties to file additional pleadings, sua sponte permitting Inlet Fish to file a supplemental memorandum to MSL's reply to Inlet Fish's cross-motion for discovery.² The ALJ also directed MSL to file a reply to the supplemental memorandum.

In its supplemental memorandum, Inlet Fish argued that it did not possess the relevant information regarding its cause of action until May, 1998. Inlet Fish argued that Goddard's earlier statements to MSL attorneys at the meeting were based on rumor, and that at that time Inlet Fish had no meaningful evidence of wrongdoing. Inlet Fish also averred that MSL's denials at that meeting gave Inlet Fish the false impression that no wrongdoing had occurred. Relying on New v. Armour Pharmaceutical Co., 67 F.3d 716 (9th Cir. 1995), Inlet Fish argued that the standard is that the statute of limitations does not begin to run when one suspects injury, but rather when one is in actual possession of facts that may prove injury.

Inlet Fish also filed a second declaration of Vincent Goddard, dated June 12, 2000. In that declaration, Goddard stated that he only obtained actual evidence of wrongdoing by MSL in May, 1998, when he spoke to a former MSL employee, and was not aware before that time of MSL's alleged violations of the Shipping Act.

² Replies to replies are ordinarily not permitted in Commission proceedings, under Rule 74 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.74.

5. MSL's Reply to the Supplemental Memorandum

In its reply, MSL argued that the record shows that Inlet Fish did have the relevant information in the Fall of 1996, and that the proceeding is thus time-barred. MSL averred that Inlet Fish failed to exercise due diligence by neglecting to examine its own records, and that the existence of a cause of action was not unknowable. Describing the proceeding as a "slam dunk case of failure to timely file," MSL averred that the ALJ should dismiss Inlet Fish's complaint.

B. ALT Order Denying the Motion to Dismiss. and Granting the Cross-motion for Discovery

On July 14, 2000, the ALJ issued an order denying MSL's motion to dismiss, and granting Inlet Fish's cross-motion for discovery. The ALJ ruled that "[s]ince the basis of the complaint is that [Inlet Fish]'s competitors had the freight on their shipments computed on a more favorable basis than [Inlet Fish], and that [Inlet Fish] was thus the victim of alleged undue discrimination, the cause of action necessarily did not accrue until [Inlet Fish] learned that its competitors had received unduly preferential treatment from an ocean common carrier." ALJ Order at 14-15. The ALJ found that Inlet Fish had "some suspicion" of rate discrimination in 1996, but not enough information to proceed. *Id.* at 15. He also found that Inlet Fish possesses thousands of pages of shipping documents and that finding the specific information leading to this complaint would be like finding a needle in a haystack. For these reasons, the ALJ concluded that Inlet Fish became aware of the information leading to its complaint only in May, 1998 after being informed by a former MSL employee that MSL had permitted similarly situated shippers to subtract the tare weight in their rate calculations. The ALJ ruled that Inlet Fish's complaint was not time-barred, and denied MSL's motion to dismiss. The ALJ also ordered the parties to draft proposed procedural schedules.

C. MSL's Request for Leave to Appeal to the Commission

After the ALJ denied the motion to dismiss, the parties submitted proposals for a procedural schedule to complete the

proceeding, and MSL filed an answer to the complaint, denying the charges. MSL then filed a motion for leave to appeal the ALJ's denial of its motion to dismiss to the Commission under Rule 153(a), 46 C.F.R. § 502.153(a), which permits an administrative law judge to certify an interlocutory appeal to the Commission when the judge finds that an immediate appeal is necessary "to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party."

1. MSL's Motion for Leave to Appeal to the Commission

In its motion for leave to appeal, MSL argued that it would suffer undue prejudice if it were forced to defend itself against Inlet Fish's charges before the Commission determined whether it retains jurisdiction over the complaint. For this reason, MSL requested that the Commission rule on the statute of limitations issue, and also that the proceeding be stayed until the Commission ruled. MSL also filed the appeal itself, in the event its motion were granted, and filed a record for appeal, consisting of several affidavits and other documents.

2. Inlet Fish's Reply in Opposition to MSL's Motion for Leave to Appeal

Inlet Fish opposed MSL's request for an interlocutory appeal, and opposed the proposed stay of discovery. Inlet Fish argued that MSL's appeal would merely delay the proceeding, and that MSL had not met the standard under Rule 153 to justify an interlocutory appeal. Inlet Fish also contended that even if the appeal were allowed, discovery should not be interrupted while the appeal is pending pursuant to Rule 153(d), 46 C.F.R. § 502.153(d), which states that "[u]nless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer."

3. The ALJ's Orders

The ALJ first issued an order holding in abeyance MSL's request to appeal the denial of its motion to dismiss, on September 27, 2000. The motion was to be held in abeyance pending the taking of discovery

to ascertain jurisdictional facts. However, MSL, in a letter sent to the ALJ, reiterated its request that its appeal go to the Commission and that no discovery take place until the Commission had ruled. Inlet Fish then sent a letter in reply, MSL replied to Inlet Fish's letter, and Inlet Fish replied to MSL's letter. On October 12, 2000, the ALJ altered his position, granted MSL's motion for leave to appeal to the Commission, and stayed the proceeding, and all discovery, pending the outcome of that appeal.

D. MSL's Appeal to the Commission. and Replies

1. MSL's Appeal

In its appeal to the Commission, MSL complained that the ALJ ignored record evidence in denying MSL's motion to dismiss. MSL averred that the standard used by the ALJ, that "the cause of action necessarily did not accrue until [Inlet Fish] learned that its competitors had received unduly preferential treatment," ALJ Order at 14-15, is incorrect. MSL argued that the correct standard should be that the cause of action accrued when Inlet Fish should have learned the relevant information, and that in this case, Inlet Fish either learned or should have learned that information in 1996.

MSL argued that Inlet Fish was informed in 1996 that its competitors were supposedly subtracting the tare weight in the rate calculations of their shipments, and that Inlet Fish was in possession of shipping documents from one of its competitors (the "Cook documents"), which documents Inlet Fish should have realized were potential evidence of preferential treatment MSL averred that this demonstrates that the relevant facts were not unknowable, and that Inlet Fish thus either knew or should have known in 1996 that it had a cause of action against MSL -- and that at this time the statute of limitations began to run.

MSL also disagreed with the ALJ's finding that Inlet Fish had thousands of shipping documents in its files such that locating and understanding the significance of the Cook documents was not possible. MSL argued that nothing in the record supports this finding. In sum,

MSL requested that the Commission reverse the ALJ, and order the case dismissed.

2. Inlet Fish's Reply to MSL's Appeal to the Commission

Inlet Fish filed a reply in opposition to MSL's appeal. Inlet Fish argued that it did undertake to determine whether it had a cause of action by asking MSL about the issue, and that MSL denied any wrongdoing at a meeting in January, 1997.

Inlet Fish also noted that the Cook documents, which MSL argues were sufficient hard evidence to trigger a duty of inquiry for Inlet Fish, actually relate solely to the domestic offshore trade. Goddard Dec. of June 12, 2000 at paragraph 11. Inlet Fish averred that the documents do not implicate international commerce or involve the FMC's jurisdiction. For this reason, Inlet Fish argued that they did not constitute sufficient evidence to initiate a claim before the Commission. Finally, despite having sought and failed to receive the ALJ's permission to certify to the Commission two issues in support of its position that this case should not be dismissed, Inlet Fish nevertheless raised and briefed those two issues.³

3. MSL's Motion for Leave to Reply to Inlet Fish's Reply

MSL filed a motion for leave to reply to Inlet Fish's reply under Rule 10 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.10, and attached its reply should the Commission grant the

³ The two issues are: (1) whether Inlet Fish's earlier counterclaim in the district court in Alaska, which was dismissed, tolled the Shipping Act's statute of limitations; and (2) whether ongoing rate discrimination implicates the doctrine of equitable tolling. These issues were not addressed by the ALJ in his order denying the motion to dismiss -- the order instead found favorably for Inlet Fish on other grounds.

motion for leave to file. Rule 10 permits waiver of the Commission's procedural rules "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." MSL noted that Inlet Fish had raised in its reply the two issues the ALJ had specifically refused to certify. MSL explained that it had not addressed those issues in its appeal because the ALJ had not certified them, and that if the Commission were to consider the issues, MSL must be given the opportunity to reply to them.

4. Inlet Fish's Reply to MSL's Motion for Leave to Reply to Inlet Fish's Reply

Inlet Fish filed a reply in opposition to MSL's motion seeking permission to reply to Inlet Fish's reply to MSL's appeal of the ALJ's order. Inlet Fish also indicated that if the FMC permitted the filing of MSL's reply to reply, then Inlet Fish would request an opportunity to file a sur-reply in response.

DISCUSSION

The issue presented by this appeal is whether the ALJ was correct in ruling that the statute of limitations accrued upon Inlet Fish learning that its competitors had allegedly received unduly preferential treatment, or whether it accrued when the shipments in question took place. If the cause of action accrued upon Inlet Fish learning *that* it had a probable cause of action, then the Commission must decide whether Inlet Fish learned of its claim in 1998, or, as MSL argued, whether Inlet Fish knew or should have known of a cause of action in 1996 or 1997.

A. Statute of Limitations

The complaint in this case was filed on January 21, 2000. The incidents that led to the complaint occurred between June and August, 1996. If the cause of action also accrued at *that time, then the* complaint was clearly filed too late and would be barred by the statute of limitations. However, Inlet Fish alleges that the cause of action did not accrue until 1998, at which time, it avers, it became aware of the existence of its potential claims against MSL.

Section 11(g) provides that the Commission shall award reparations for actual injury when a complaint has been filed within three years after the cause of action accrued. 46 U.S.C. app. § 1710(g). Section 11 (a) provides that any person may file a complaint, and may (but need not) seek reparations for alleged injury. 46 U.S.C. app. § 1710(a). It might be possible to construe these sections as meaning that a person may at any time file a complaint, over which the Commission would have jurisdiction irrespective of the type of relief sought, but that section 11(g) provides that reparations could only be awarded if the complaint had been filed within three years after the cause of action accrued. However, the Commission has already interpreted section 11(g) in Rule 63(a) of its Rules of Practice and Procedure, 46 C.F.R. § 502.63(a). Rule 63(a) provides that:

Complaints seeking reparation pursuant to section 11 of the Shipping Act of 1984 shall be filed within three years after the cause of action accrued.

(emphasis added). Thus, under Rule 63(a), if the relief sought by the complaint, i.e., reparations, is time-barred, then the complaint is barred. As we discuss below, this does not apply to complaints seeking other forms of relief, such as cease and desist orders.

The issue before the Commission, therefore, is whether Inlet Fish's complaint was filed within three years after the cause of action accrued. It is unquestioned that the complaint was filed more than three years after the shipments in question took place; what is in dispute is whether the cause of action accrued when the shipments took place, or at a later date, when Inlet Fish either knew or should have known that it had been subjected to purported Shipping Act violations. The rule Inlet Fish urges the Commission to adopt, that a cause of action accrues when a party knew or with reasonable diligence should have known that it had a claim, is called the "discovery rule." The approach suggested by MSL is the "time of injury rule." MSL also argues that if the Commission determines to adopt the discovery rule, it should do so narrowly, and not extend the benefit of the rule to Inlet Fish in this case.

Although the ALJ's order denied MSL's motion to dismiss entirely, the order does not specify which of Inlet Fish's statutory claims survived. Instead, the ALJ notes that "[s]ince the basis of the complaint is that [Inlet Fish]'s competitors had the freight on their shipments computed on a more favorable basis . . . and that [Inlet Fish] was thus the victim of alleged undue discrimination, the cause of action necessarily did not accrue until [Inlet Fish] learned that its competitors had received unduly preferential treatment from an ocean common carrier." ALJ Order at 14-15. The ALJ cited two Supreme Court cases, Pennsylvania R.R. Co. v. International Coal Mining Co., 230 U.S. 184 (1913) and Southern Pac. Co. v. Darnell-Taenzer Co., 245 U.S. 531 (1918), for this proposition.

In this regard, we note that Inlet Fish's complaint specified four provisions of the Shipping Act that it claimed were violated: sections 10(b)(2), 10(b)(4), 10(b)(6), and 10(b)(12). See supra at 3-4. However, only sections 10(b)(6) and 10(b)(12) would appear to be implicated by Inlet Fish's claims of discrimination, and only these sections would seem to be covered by the standard cited by the ALJ that claims for unreasonable charges accrue when the charges are paid while claims of discrimination accrue when evidence of discrimination is uncovered. ALJ Order at 14. Nevertheless, the ALJ did not dismiss Inlet Fish's other claims under sections 10(b)(2) and 10(b)(4).

1. Supplemental Memoranda

While both parties in their numerous motions and replies cited cases from several courts of appeals stating various formulations of the rule that a cause of action accrues when a party learns or could have learned that it has been injured, none of the cited cases involves section 11 (g) of the Shipping Act, and neither party undertook to explain how its cited cases apply to that section. Moreover, neither party provided evidence of Shipping Act jurisprudence applying this standard. Despite the massive number of motions and replies thus far filed, the issue remained inadequately briefed. Therefore, by order dated April 24, 2001, the Commission sought supplemental memoranda from the parties. The order seeking additional briefing also raised the questions whether a party can file a complaint seeking remedies other than the

payment of reparations, and whether such a complaint would be subject to the statute of limitations. These latter questions were not raised by Inlet Fish or MSL and were not addressed by the ALJ. As noted above, section 11(g) imposes a three-year period on complaints seeking “payment of reparations to the complainant for actual injury,” but does not address other forms of relief. Inlet Fish’s complaint in this case seeks reparations and “an order. . . commanding [MSL] to establish and put in force such practices as the Commission determines to be lawful and reasonable.” Complaint at 3.

We address the parties’ responses to the Commission’s three questions below.

- (1). Whether a cause of action seeking reparations under the Shipping Act accrues differently for claims addressing discrimination or disadvantage under sections 10(b)(6) and 10(b)(12) than for claims addressing rebates and false weighing under sections 10(b)(2) and 10(b)(4).

In response to this question, Inlet Fish merely contends that the causes of action accrue identically.⁴ In its supplemental memorandum, MSL also contends that causes of action accrue in the same manner under all sections of the Shipping Act. MSL further avers that the cause of action accrues when an unlawful act is committed, citing Western Overseas Trade and Dev. Corp. v. ANERA, 26 S.R.R. 874,885 (1993); Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth., 18 S.R.R. 1079 (ALJ 1979); and Carton-Print Inc. v. The Austasia Container Express Steamship Co., 17 S.R.R. 571, 581-2 (ALJ 1979). MSL further avers that the Commission has rejected equitable doctrines that would toll the statute of limitations, and that it should continue to do so. Western Overseas, 26 S.R.R. at 885.

⁴ Inlet Fish’s response to the Commission’s order seeking additional briefing is three pages in length and does not cite any statutory provisions, regulations, or case law.

The argument that the causes of action accrue identically implicitly criticizes the ALJ's reasoning in his order denying MSL's motion to dismiss. The ALJ ruled that "the basis of the complaint is that [Inlet Fish]'s competitors had the freight on their shipments computed on a more favorable basis than [Inlet Fish], and that [Inlet Fish] was thus the victim of alleged undue discrimination." ALJ Order at 14. The ALJ found that claims for undue discrimination accrue differently from claims involving damages from unreasonable charges, and that such discrimination claims accrue when the injured party learns that its competitors received unduly preferential treatment.

As explained above, section 10(b)(2) and section 10(b)(4) do not seem to implicate discrimination. Inlet Fish and MSL argue that causes of action under those sections should accrue identically with causes of action under section 10(b)(6) and section 10(b)(12), which do involve charges of discriminatory conduct. This position would seem to undermine the distinction drawn in the ALJ's order, that claims of discrimination are subject to a special form of accrual which occurs upon receipt of knowledge that discrimination has been suffered. It is unclear why Inlet Fish, which enjoyed the benefit of the ALJ's ruling, did not attempt to defend that ruling. However, Inlet Fish states that it "could find no relevant authority to the contrary" of the notion that "causes of action under all four provisions should accrue identically."

(2). If so, whether a cause of action seeking reparations for a claim of discrimination or disadvantage accrues when the party discovered that it may have been injured, or should have discovered that it may have been injured. The parties should explain why court cases addressing other statutory schemes should apply to section 11(g) of the Shipping Act.

In its supplemental memorandum, Inlet Fish again asserts that all causes of action under the Shipping Act accrue identically, and does not otherwise address this question. MSL contends that the sections should accrue identically; however, if they do not, MSL avers that the Commission should utilize a narrow version of the discovery rule.

In response to the request to explain why court cases addressing other statutes should apply to the Shipping Act, MSL observes that the Commission “routinely looks to federal trial practice for guidance on procedural issues.” However, it does not attempt to illustrate why the particular cases it cites are consistent with or relevant to the Shipping Act. Inlet Fish did not cite any cases in its supplemental memorandum and did not otherwise address the question.

(3). Whether the portion of Inlet Fish’s complaint seeking relief other than the payment of reparations is subject to the three-year period established in section 11 (g).

In its complaint, Inlet Fish had asked the Commission to issue an order “commanding [MSL] to establish and put in force such practices as the Commission determines to be lawful and reasonable.” This seemed to indicate that Inlet Fish was seeking a cease and desist order commanding MSL to halt the practices Inlet Fish believes were unlawful. MSL apparently shared this interpretation of the complaint. Addressing Question 3, MSL notes that a claim for a cease and desist order is not barred by section 11(g), citing Rascator Maritime. SA v. Cargill, Inc., 21 S.R.R. 1374 (1982). However, MSL also avers that Inlet Fish has provided no basis for a finding that MSL has continued the practices alleged to be unlawful, and that for this reason, a cease and desist order would be inappropriate.

In its response to Question 3, however, Inlet Fish states that it “seeks no other relief other than an award of costs, interest and attorneys’ fees.” This is surprising given the language of the complaint. It appears that Inlet Fish either did not intend the language in its complaint to be construed as seeking a cease and desist order, or that it has abandoned that portion of its complaint. Therefore, the Commission notes that the three-year statute of limitations does not apply to complaints seeking nonreparation orders, but finds that Inlet Fish is not seeking such relief in this case. See, e.g., Western Overseas, 26 S.R.R. at 885 n.17 (“The 3 year statute of limitations in section 11(g) of the 1984 Act applies only to requests for reparations. It would not prevent the Commission from issuing a cease and desist order in a case brought over three years after the cause of action accrued”).

2. The Discovery Rule

The Commission has determined to adopt the discovery rule, and to hold that Inlet Fish's cause of action accrued when it knew or should have known that it had a case against MSL. To find that the cause of action accrued when the shipments took place would appear to be overly restrictive. It would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had no conclusive information about such a dispute for several years after the shipments took place.

There are compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action. The Commission has an interest in the precedent established by its adjudication of alleged Shipping Act violations -- such adjudication is a form of private enforcement of the rights established by Congress in the statute. Based on this understanding of the Act, a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct. Also, application of a stricter rule would exonerate certain respondents even if their conduct were unlawful, simply because a potential complainant was unable to identify the existence of its cause of action. This is, of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.

The Shipping Act itself suggests this result. Section 13(f)(2), 46 U.S.C. app. § 1712(f)(2), provides that "proceeding[s] to assess a civil penalty under this section shall be commenced within 5 years from the date the violation occurred" (emphasis added). Section 14(e), 46 U.S.C. app. § 1713(e), provides that "action[s] seeking enforcement of a Commission order must be filed within 3 years after the date of the violation of the order" (emphasis added). This is notably different from the use of the phrase "after the cause of action accrued" in section 11 (g), and would appear to raise a presumption that if Congress had intended claims under section 11 seeking the payment of reparations to be filed within three years "from the date the violation occurred," it would have used such language.

Nor is the Commission precedent cited by MSL contrary to this outcome. In Western Overseas, 26 S.R.R. at 885, the Commission held that "it is unnecessary to address the issue of whether [a] claim for reparations is barred by the 3 year statute of limitations in section 11 (g)." While the Commission went on to state that "the statute of limitation begins to run when there is commission of an act which causes injury," id., that observation is clearly obiter dicta. In Print Inc. v. The Austasia Container Express Steamship Co., 17 S.R.R. 571, 581-2 (ALJ 1979), the administrative law judge addressed a case in which the complainant could not prove actual injury because the injury was incurred by the complainant's consignee in the underlying shipping transaction. That consignee had not filed a complaint, and the judge ruled that an attempt to assign the consignee's claim to the actual complainant "would be treated as a new complaint and thus be time-barred." Id. at 581. The judge did not address the issue of when the complainant knew or should have known of the consignee's cause of action. In Seatrains Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth., 18 S.R.R. 1079, 1081 (ALJ 1979), the administrative law judge stated that "[g]enerally a cause of action accrues and the statute of limitations begins to run when there is the commission of an act which causes injury" (emphasis added). The issue in Seatrains Gitmo was whether a marine terminal operator's denial of the use of certain port facilities to the complainant was violative of the Shipping Act, 1916. The facts of the case indicate that there was no possibility that the complainant was unaware of its claim, inasmuch as it knew of the denial of its request to use the facilities at the time of the denial. None of these cases indicates that the Commission has previously determined to adopt the time of injury rule in all instances.

Carton-

Furthermore, implementing the rule that a cause of action accrues when a party knew or should have known that it had a claim is consistent with the statutory construction used by numerous courts of appeals. In Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 342 (D.C. cir. 1991), the court held that unless Congress has provided a directive that a cause of action accrues when an injury occurs, the discovery rule should apply. Explaining the practical application of the rule, the court in Connors held:

[I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

Id. (citing Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990)). The court also noted that this rule has been adopted by “[a]t least eight federal courts of appeals.” Id.

Based upon the foregoing, the Commission has decided to apply the discovery rule in this case to determine when Inlet Fish’s cause of action accrued under section 11 (g) of the Shipping Act.

B. Findings of Fact

Having decided that Inlet Fish’s cause of action accrued when it knew or had reason to know that it had a claim against MSL, we must now determine when Inlet Fish knew or should have known about its claim. From June through August, 1996, Inlet Fish engaged MSL to transport Inlet Fish’s seafood products from Alaska to foreign destinations. On those shipments, Inlet Fish did not subtract the tare weight from the cargo weight in determining freight charges. In the Fall of 1996, Inlet Fish President Vincent Goddard had a conversation or conversations with some of his Japanese customers, who informed him that he could save money by subtracting the tare weight from the cargo weight. Goddard inferred from this that his competitors might be subtracting the tare weight in determining freight charges. Goddard Dec. of June 12, 2000 at paragraphs 2-4. Also, in the Fall of 1996, Inlet Fish purchased a number of containers of coho salmon from Cook Inlet Processing, a competitor. Goddard Dec. of June 12, 2000 at paragraph 10. The documents relating to this purchase were in Inlet Fish’s files. Id.

In a meeting on January 9, 1997, Goddard raised with MSL the issue of whether MSL was permitting other shippers to subtract the tare weight when determining freight charges, and MSL denied that it was doing so. Affidavit of William De Voe March 20, 2000 at paragraphs 2-4; Goddard Dec. of June 12, 2000 at paragraph 7.

The parties were involved in a separate bankruptcy dispute and drafted a proposed settlement, which Goddard never signed. MSL's witnesses allege that Goddard did not sign the agreement because he knew at that time that Inlet Fish had a cause of action against MSL. However, the witnesses' statements are contradictory, as the ALJ appears to have recognized.⁵ See ALJ Order at 15. Goddard's explanation for failing to sign the settlement was that it contained terms the parties had not agreed to. Goddard Dec. of June 12, 2000 at paragraph 7.

⁵ MSL's evidence is contradictory and presents three alternative factual accounts for when Goddard knew he had a cause of action. First, in the March 20, 2000 declaration of Timothy McKeever, McKeever states that Goddard and his lawyer told McKeever that based on the freight bills, Inlet Fish believed in late 1996 that the competing shipper, Cook, had been allowed to subtract the tare weight. Affidavit at paragraph 5. In the same affidavit, however, McKeever states that Goddard told him in a meeting on April 1, 1999 that in the Summer of 1997 Goddard "became aware of his company's claims for overcharges based on other companies [sic] under reporting of weight." Id. at paragraph 9. Finally, De Voe asserts that in a meeting on January 9, 1997 between De Voe and Goddard, Goddard raised the issue of tare weight for the first time, and MSL's representatives denied that any shippers were permitted to subtract the tare weight. Affidavit of William De Voe, March 20, 2000 at paragraph 5. These are not legal arguments in the alternative. Rather, they are conflicting factual assertions. One must question whether MSL is contending that Inlet Fish knew about its cause of action in late 1996, in January, 1997, or in the Summer of 1997.

In May, 1998, Goddard had a conversation with a former MSL employee, who told him about the alleged tare weight practice, and who advised that MSL's decision in 1997 to change its tariff from gross weight to net weight was probably evidence that MSL executives were aware of the issue. The former MSL employee also informed Goddard that one of the shippers subtracting the weight was Cook; Goddard remembered that he had had dealings with Cook in the Fall of 1996 -- he then searched his files for the Cook documents. The salmon from Cook had been purchased in cold storage in Seattle, and for the most part "there were no shipping documents." *Id.* at paragraph 10. Some of the containers of salmon had been purchased en route, however, and the documentation for those purchases contained copies of bills of lading. These bills of lading, which involve domestic offshore commerce outside the scope of the Commission's jurisdiction, indicated that Cook had shipped its products stating a net weight of 50 pounds and a gross weight of 52.5 pounds. Goddard alleges that a carton of frozen salmon weighs a minimum of 55 pounds gross. Based on this discrepancy as well as the MSL employee's allegations, Goddard states that it was at this point in time that he became aware that Inlet Fish might have a cause of action against MSL.

Reviewing these facts, the Commission has determined that Inlet Fish knew that it had a cause of action against MSL in May, 1998. MSL, of course, argues that, because Inlet Fish was in possession of the Cook documents in 1996 and had heard the Japanese rumors by that time, it either knew or should have known about the discrepancy at that time. However, the record indicates that the Cook documents related to domestic offshore commerce, not international commerce, and thus involved transactions outside the scope of the Commission's jurisdiction. Furthermore, as Goddard stated, for the most part "there were no shipping documents." The fact that a few bills of lading were, apparently incidentally, among the documents relating to Inlet Fish's purchase of salmon does not trigger Inlet Fish's knowledge of the claim. It appears that Inlet Fish was not aware of its cause of action until Goddard's conversation with the MSL employee in May, 1998. We therefore find that Inlet Fish was not aware, and could not reasonably have been aware, that it had a cause of action against MSL until May,

1998.⁶

C. MSL's Reply to Reply and Inlet Fish's Request to File a Sur-reply

Both parties in this proceeding have been extremely litigious and intent on asserting the last word. Before he issued his order denying the motion to dismiss, the ALJ had already permitted the filing of a reply to a reply by Inlet Fish, and a response thereto by MSL, and also permitted MSL to take the extraordinary step of petitioning the Commission, at the very outset of the case, to overturn the ALJ's jurisdictional ruling denying MSL's motion to dismiss. None of this is contemplated as customary by the Commission's Rules of Practice and Procedure.

The issue whether the Commission should permit the reply to a reply, and the sur-reply, arises from Inlet Fish's discussion of the Alaska claim's effect on tolling the statute of limitations, and the effect of an ongoing violation on the statute of limitations. See Reply of Inlet Fish at 7-9. The ALJ had previously denied Inlet Fish's request to certify those issues to the Commission, see ALJ Order of October 12, 2000 at 4 n.2, but Inlet Fish raised the issues anyway in its reply to MSL's appeal to the Commission. MSL then filed a motion requesting the opportunity to reply to Inlet Fish on the two issues, and Inlet Fish requested a sur-reply should the Commission accept MSL's reply.

The ALJ denied certification of the two issues, and they are not properly before the Commission. The two issues flow from an order

⁶ In Western Overseas, 26 S.R.R. at 885, the Commission found that the doctrine of equitable estoppel, which prevents a respondent from pleading the statute of limitations when a complainant has reasonably relied on the respondent's statements or actions, has no place in Commission jurisprudence. This decision is not disturbed by our ruling in the present proceeding. If Inlet Fish were merely contending that it did not file a complaint because MSL had indicated that it had done nothing wrong, the complaint would likely be barred.

that was favorable to Inlet Fish. One generally may not appeal a favorable order. See Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640 (D.C. Cir. 1998). We have determined to deny MSL's request to file a reply, and also to deny Inlet Fish's request to file a sur-reply. We also admonish the parties to strive to stay within the scope of the Commission's procedural rules during the remainder of this proceeding.

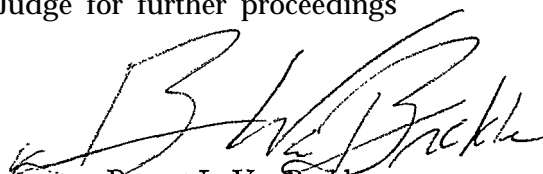
CONCLUSION

The Commission finds that Inlet Fish's cause of action against MSL accrued in May, 1998, when Inlet Fish learned that it had such a cause of action. MSL's appeal of the ALJ's order denying its motion to dismiss is denied, and the case is remanded to the ALJ for further proceedings addressing the merits of Inlet Fish's claim.

THEREFORE, IT IS ORDERED, That MSL's Appeal is denied.

IT IS FURTHER ORDERED, That the case is remanded to the presiding Administrative Law Judge for further proceedings consistent with this Order.

By the Commission.


Bryant L. VanBrakle
Secretary